Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

Leonard A. Pelullo,
Petitioner,

v.

United States.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and in what circumstances the prosecution's failure to disclose relevant evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), is excused by the defendant's own ability to uncover the evidence through the exercise of "due diligence."

2. Whether, assuming that such a "due diligence" obligation exists, a defendant fails to exercise sufficient diligence when the government misleads him into not pursuing the evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leonard A. Pelullo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (Pet. App. 1a-44a) is published at 399 F.3d 197. The district court's judgment and opinion (Pet. App. 45a-87a) are unpublished.

JURISDICTION

The Third Circuit denied rehearing and rehearing en banc on March 24, 2005. See Pet. App. 87a. Justice Souter subsequently extended the time to file this Petition to and including August 19, 2005. App. 04A1041. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment provides in relevant part: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was convicted on charges arising from an alleged embezzlement scheme. The district court subsequently concluded, based on extensive factfinding, that the government had committed a serious violation of its duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose relevant evidence to the defense. Prosecutors, the district court found, repeatedly misled petitioner and the court into believing that a cache of documents in the government's possession contained no relevant exculpatory evidence. In fact, the court found, many of those documents seriously undercut the credibility of crucial testimony offered by government witnesses at trial. The district court further found that absent the prosecutors' false representations, petitioner's counsel would have ob-

tained the documents from the government and, armed with the information contained in those documents, would have been able to respond convincingly to the trial testimony. The district court held that a new trial was accordingly required. On appeal, the Third Circuit did not disturb the district court's findings that the documents had not been disclosed to petitioner and that they contained important exculpatory evidence. It nonetheless denied petitioner a retrial on the remarkable ground that petitioner had a duty to discover the evidence in the government's possession himself, notwithstanding the government's repeated misrepresentations that the documents in its possession contained no relevant evidence.

1. During the early and mid-1990s, the government engaged in an investigation of petitioner Leonard Pelullo in the Middle District of Florida. In 1991, as part of that investigation, it seized essentially all of the documents relating to approximately twenty different corporate entities controlled by petitioner. The next year, the government returned some of those documents (weighing some seventy-five thousand pounds) in a disorganized fashion. However, the government retained a very large cache – 160 boxes and thirty-six file cabinets – of the documents. Significantly, the government declined to provide petitioner with an index that differentiated the documents it was retaining from those it had returned.[1]

2. In 1994, while still in possession of the Florida documents, the government indicted petitioner in the District of New Jersey on charges arising from a separate investigation of an alleged scheme by petitioner to misappropriate the pension funds of a printing company, the Compton Press.[2] This petition arises from that New Jersey prosecution, challenging

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[1] The government eventually voluntarily dismissed the Florida charges.

[2] The government charged petitioner with fifty-four counts of conspiracy, embezzlement, and money laundering.

the government's failure to turn over to petitioner, as required by *Brady*, relevant documents retained from the Florida seizure.

During the course of the New Jersey proceedings, prosecutors disclosed to petitioner six specific boxes of documents retained from the 1991 seizure. The rest, the government repeatedly advised petitioner and the district court, were relevant *only* to the separate Florida investigation, and *not* to the New Jersey proceedings. See Pet. App. 59a. The government made those representations not only prior to trial but also, most importantly for present purposes, both on the eve of and during the trial itself. Immediately prior to trial, petitioner's counsel indicated his willingness to send a representative to review materials in the Florida documents. The AUSA prosecuting the case in New Jersey, however, advised petitioner's counsel "that he had been *assured* by his agents and the Florida prosecutor that there were *no documents* in Jacksonville pertaining to Compton Press or the charges against Mr. Pelullo in this district and that [counsel] *should not bother* to go to Jacksonville." *Id.* at 15a (emphases added). In response to another specific query from petitioner's counsel, the AUSA "responded that he had spoken to the prosecutor in the Middle District of Florida and had been told that the prosecutors in that district were *not in possession of any documents* relevant to Compton Press or the charges against Mr. Pelullo in this district." *Ibid.* (emphasis added).

During trial, the district court expressly sought to verify that the prosecutor was directing representatives in Florida to undertake "an exhaustive search" of the documents for exculpatory evidence. The prosecutor responded, "Yes, I am." C.A. J.A. 385. The government later advised petitioner's counsel that "[t]he United States is not aware of any additional * * * *Brady* or *Giglio* material." *Id.* at 4040-41. In response to further inquiries regarding disclosures of the Florida documents, the government represented not only that "[a] thorough search has been made" but also that "[a] thorough search is continuing." *Id.* at 2618-19. The government did

not disclose any other Florida documents until after the trial. Nor, critically, did it retreat from its representations that it had reviewed those documents and they contained no evidence relevant to the New Jersey proceedings.

3. At trial, the prosecution's strategy was to put on witness testimony that petitioner had undertaken particular transactions relating to the Compton Press pension funds without authorization and for improper purposes. Petitioner learned of this testimony only at the trial: his indictment did not set forth the government's proof, but instead stated the charges in sparing fashion. (The entire superseding indictment, setting forth all fifty-four counts, spans only a meager eighteen pages. C.A. J.A. 3716-33.)

As the district court later found, petitioner would have been able to show that much of this testimony was false if the government had complied with its *Brady* obligations and turned over exculpatory documents retained from the Florida seizure. As discussed further *infra*, government witnesses asserted that petitioner had secured financial control over an entity rather than providing it with a "bridge loan"; that petitioner had siphoned cash from an entity he had taken over with Compton Press funds; and that petitioner had withdrawn more funds from the Compton Press trusts than he had deposited. The district court later found that those statements, though central to the government's case, were – unbeknownst to the jury – utterly untrue or at the very least highly dubious. The court further found that had petitioner's counsel reviewed the Florida files, he would easily have obtained a substantial amount of evidence that demonstrated the many inaccuracies in the testimony put on by the government. Yet the prosecutors' repeated assurances to petitioner and to the court that the documents held by the government in Florida contained no relevant evidence led petitioner's counsel to believe – erroneously – that there was no need to review those files during the trial. Pet. App. 59a.

Petitioner was convicted on all counts and sentenced to seventeen-and-a-half years in prison. His conviction was affirmed on appeal (185 F.3d 863 (CA3 1999) (table)), and this Court denied certiorari (528 U.S. 1081 (2000)).

4. After trial, petitioner filed a timely motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. He alleged that newly discovered evidence demonstrated that the government had violated its duty under *Brady* to produce exculpatory evidence and its related duty under *Giglio* v. *United States*, 405 U.S. 150 (1972), to produce evidence that impeached its witnesses. Specifically, petitioner explained that, after trial, a representative of his counsel had examined the Florida documents and discovered, contrary to the government's repeated representations, that those files included numerous exculpatory and impeaching documents.

The same district judge who had overseen petitioner's trial (Debevoise, J.) received extensive briefing, reviewed numerous exhibits, and conducted a lengthy hearing. See Pet. App. 46a-87a. On the basis of this evidence, the district court made detailed findings that numerous documents held by the government in Florida were directly "exonerating and/or impeaching" of crucial testimony that the government's witnesses had offered about the "critical issue" of "[petitioner]'s intent." *Id.* at 60a, 59a. Several examples from the district court's detailed ruling illustrate the significance of the material withheld by the government:

- A government witness testified that, contrary to petitioner's representations that he had merely provided a "bridge loan" to the travel agency, petitioner had actually made an investment that gave him majority control of the agency in order to misappropriate its accounts. *Id.* at 61a. The Florida materials included numerous documents demonstrating that the funds had constituted a loan. *Ibid.*

- A government witness testified that petitioner had looted funds from the travel agency. *Id.* at 61-62a. The Florida documents included proof that petitioner had actually pro-

vided funds to the travel agency that exceeded by hundreds of thousands of dollars what he had been repaid. *Ibid.*

- A government witness testified that petitioner specifically ordered the withdrawal of $200,000 in funds from the travel agency for improper purposes. *Id.* at 63a. The Florida documents demonstrated that, in fact, the transfer had been ordered by the agency's president. *Ibid.*

- Government witnesses testified that petitioner had directed the withdrawal of more funds from the Compton Press funds than he contributed. *Id.* at 63a-64a. The Florida documents included proof that petitioner's investments exceeded any withdrawals by a large amount, evidence that the district court found "bears significantly on the testimony" of the government's witnesses. *Ibid.*

- The government also asserted that petitioner had misappropriated the proceeds of an insurance contract. One government witness supported that theory by testifying that he and petitioner met and discussed those funds the day they were deposited into Compton Press's bank account. In fact, withheld documents demonstrated that such a meeting could not have occurred because petitioner was in another state at the time. *Id.* at 65a-66a.

- The government also failed to disclose to petitioner an important piece of evidence that was neither among the Florida documents nor created by one of his own companies. A government witness testified at trial that his signature had been forged on various documents. The government failed to disclose, however, a handwriting report that the signatures were genuine. The district court specifically recognized that the report "was a pretty persuasive piece of evidence" (C.A. J.A. 3936) that "would have cast doubt upon important testimony of a key witness" (Pet. App. 67a) and indeed "tend[ed] to show that [the witness] lied at trial" (*id.* at 66a). The government attorney prosecuting the case, in response to petitioner's *Brady* claim, acknowledged that he "was aware of"

the report but had nonetheless failed to disclose it. C.A. J.A. 3937.

Citing these and other examples, the district court found "a mass of documentary and other evidence which seriously undermines the testimony of a number of the Government witnesses." C.A. J.A. 3998. The court concluded that the government had violated petitioner's constitutional rights by repeatedly misrepresenting to petitioner, including at trial, that it did not hold relevant evidence in Florida. As the court explained, even if a defendant is otherwise ordinarily required to uncover exculpatory evidence himself, petitioner's "assigned counsel and, shortly before trial, his retained counsel were faced with the practical problem of an impending trial and were entitled to rely on the government's assurances that it had reviewed the warehouse documents and that there was no relevant material there other than that which was contained in the six boxes" returned to petitioner. Pet. App. 60a.

The district court found that the government's misconduct was not excused by the government's offer, made before it informed petitioner of its evidence, to allow petitioner to photocopy the massive cache of Florida documents. Although the documents were ostensibly available, the government's offer was effectively negated by the government's insistence that petitioner pay more than $50,000 in photocopying costs he could not afford and – more importantly – by its repeated statements that the documents contained no relevant evidence. Pet. App. 59a-60a; Pet. C.A. Br. 45 n.10. See also C.A. J.A. 3930 ("THE COURT: I recall time and time again, you're [sic] assuring the defense and me that you had gotten all the relevant documents from the Florida warehouse.").

On that basis, the district court found "such a serious violation of the government's *Brady* obligations that defendant's motion for a new trial must be granted." Pet. App. 57a.

5. On appeal, the Third Circuit reversed. That court viewed the case as arising "at the intersection between two particular branches of the *Brady* doctrine": the government's